No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TECHNOGRAPH LIQUIDATING TRUST,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SIDNEY BENDER
AARON LEWITTES
JANINE L. BENDER
LEVENTRITT LEWITTES & BENDER
1205 Franklin Avenue
Garden City, N.Y. 11530
(516) 742-4250

ALFRED W. PUTNAM, JR.
DRINKER BIDDLE & REATH
1100 Philadelphia National Bank Building
Philadelphia, Pa. 19107
(215) 988-2700

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

ROBERT K. PAYSON
POTTER ANDERSON & CORROON
350 Delaware Trust Building
Wilmington, Del. 19899
(302) 658-6771

Counsel for Petitioner

* Counsel of Record

October 27, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESIONS PRESENTED

1. Whether the United States Court of Appeals for the Federal Circuit erred when, for reasons of comity and judicial economy, it refused jurisdiction over an appeal, under 28 U.S.C. § 1295(a)(1), from the final decision of a district court in which the district court's jurisdiction was based on a claim expressly arising under the patent laws.

2. Whether the United States Court of Appeals for the Third Circuit erred when it accepted and decided the merits of an appeal from the final decision of a district court in which the district court's jurisdiction expressly was based on the patent laws, when that appeal had been transferred to the Third Circuit from the United States Court of Appeals for the Federal Circuit and the Federal Circuit had made no finding of a want of jurisdiction as required by 28 U.S.C. § 1631.

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IN THE

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No. ———

TECHNOGRAPH LIQUIDATING TRUST,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Technograph Liquidating Trust ("Technograph") hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The judgment order of the United States Court of Appeals for the Third Circuit (App., *infra*, 24a-25a) is not reported. The decision of the district court (App., *infra*, 9a-19a) is not reported.

The opinion and order of the United States Court of Appeals for the Federal Circuit (App., *infra*, 2a-3a) transferring the appeal below to the Third Circuit is not reported. The order of the Third Circuit (App.,

infra, 8a) denying Technograph's motion to retransfer the appeal to the Federal Circuit also is not reported.

JURISDICTION

The judgment order of the Third Circuit was entered on June 29, 1987. On September 21, 1987, Justice Brennan extended the time for filing this petition to and including October 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Courts Improvement Act of 1982, 28 U.S.C. § 1295(a)(1) provides, in pertinent part:

> The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—(1) of an appeal from a final decision of a district court of the United States . . . if the jurisdiction of that court was based, in whole or in part, on Section 1338 of this title . . . .

The statute governing jurisdiction under the patent laws, 28 U.S.C. § 1338, provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents . . . .

The statute governing transfer between the courts of appeals, 28 U.S.C. § 1631, provides, in pertinent part:

> Whenever . . . an appeal . . . is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred . . . .

STATEMENT

This case was brought as a "civil action for patent infringement." Complaint, ¶ 1 (App., *infra*, 20a-23a). The patent, of which petitioner is the exclusive licensee, covers a lubricating process used in cold-forming metal car parts with pressure. From the outset, the only basis of federal court jurisdiction over this case has been the "Patent Laws of the United States." *Id.*; 28 U.S.C. § 1338.

Petitioner Technograph's patent was held valid, *Devex Corp.* v. *General Motors Corp.* 321 F.2d 234 (7th Cir. 1963), *cert. denied*, 375 U.S. 971 (1964) [1] and respondent was found to have infringed the patent in its production of automobile bumper and non-bumper parts. *Devex Corp.* v. *General Motors Corp.*, 467 F.2d 257 (3rd Cir. 1972), *cert. denied*, 411 U.S. 973 (1973). Technograph was awarded damages of a reasonable royalty for the infringement relating to bumper parts and prejudgment interest on that royalty. *Devex Corp.* v. *General Motors Corp.*, 667 F.2d 347 (3rd Cir. 1981), *aff'd*, 461 U.S. 648 (1983) (affirming award of prejudgment interest).[2] No royalty was awarded on the 1.3 billion non-bumper parts found to be an infringement of petitioner's patent, despite the statutory requirement that no less than a "reasonable royalty" be awarded upon a finding of infringement. 35 U.S.C. § 284; *Devex Corp.*, 667 F.2d 347. The appeal below involves petitioner's effort to seek compensation for the infringement related to those non-bumper parts and additional post-judgment interest.

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[1] The only petitioner in this case is Technograph Liquidating Trust, successor to Technograph, Inc., a North Carolina corporation. The other named parties below no longer have any interest in this litigation.

[2] The amount and method of calculation of post-judgment interest were determined in *Devex Corp.* v. *General Motors Corp.*, 749 F.2d 1020 (3rd Cir. 1984), *cert. denied*, 106 S. Ct. 68 (1985).

On June 27, 1986, the United States District Court for the District of Delaware denied Technograph's motion: (1) to modify the award of post-judgment interest; and (2) to reconsider, in light of intervening decisions of the Federal Circuit, its refusal to award any royalty for the respondent's infringement of Technograph's patent in the production of non-bumper parts. App., *infra*, 19a. Petitioner Technograph appealed that decision to the Federal Circuit, pursuant to 28 U.S.C. § 1295(a)(1).[3] Respondent moved to transfer the appeal to the Third Circuit, under 28 U.S.C. § 1631, and the Federal Circuit granted the motion. App., *infra*, 1a-3a. The Federal Circuit held that the transfer to the Third Circuit best served "[t]he interests of comity and judicial economy." App., *infra*, 3a. The court, however, did not make a finding of lack of jurisdiction as required by statute. 28 U.S.C. § 1631; App., *infra*, 2a-3a. Technograph then moved to transfer the case back to the Federal Circuit because of lack of jurisdiction in the Third Circuit. But that motion was denied, without explanation.[4]

On June 29, 1987, the Third Circuit affirmed, without opinion, the decision of the district court. App., *infra*, 24a-25a.

REASONS FOR GRANTING THE PETITION

This petition raises only the issue of whether the Third Circuit possessed jurisdiction to hear and decide the appeal from the District Court for the District of Delaware when the jurisdiction of the district court

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[3] Section 1295(a)(1) was enacted as part of the Federal Courts Improvement Act of 1982, Pub. L. 97-164, Title I, 127(a), the effective date of which was October 1, 1982.

[4] Technograph filed petitions for writs of certiorari from the Federal Circuit's interlocutory order transferring the case and from the Third Circuit's interlocutory denial of Technograph's motion to retransfer the case to the Federal Circuit. Both of those petitions were denied. 55 U.S.L.W. 3607 (March 9, 1987).

indisputably arose under the patent laws. The jurisdictional issue now finally resolved by the Federal and Third Circuits in this case involves an important and recurring question of federal law, *viz.*, the extent and nature of the appellate jurisdiction of the United States Court of Appeals for the Federal Circuit in patent cases under 28 U.S.C. § 1295(a)(1). In the Federal Courts Improvement Act of 1982, Pub. L. 97-164, Title I, § 127(a), Congress provided in unequivocal language that: "the Federal Circuit shall have exclusive jurisdiction of an appeal from a final decision of a district court . . . if the jurisdiction of that court was based, in whole or in part, on section 1338." 28 U.S.C. § 1295(a)(1). The Third Circuit has exercised its jurisdiction over this patent appeal in a manner that raises an issue of national importance because the holding below is flatly contrary to the language and intent of the Federal Courts Improvement Act. 28 U.S.C. § 1295(a)(1).

Moreover, the decision below conflicts with the decisions of other courts of appeals that have held that the statute means exactly what it says—that Congress granted the Federal Circuit exclusive jurisdiction over cases arising under the patent laws. See *Kidde, Inc.* v. *E.F. Bavis & Assoc.*, 735 F.2d 1085 (8th Cir. 1984); *Atari, Inc.* v. *JS & A*, 747 F.2d 1422 (Fed. Cir. 1984). It also conflicts with decisions of this Court and other courts of appeals that recognize that considerations of economy and comity do not justify disregard of explicit limitations placed on the jurisdiction of a federal court. See *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1978); *Professional Managers' Association* v. *United States*, 761 F.2d 740 (D.C. Cir. 1985) (per curiam). Finally, the decision adds to the jurisdictional confusion resulting from another, and related, split in the circuits between those decisions that hold that the Federal Circuit has exclusive jurisdiction over a case in which the right to recovery turns on a construction of

patent laws, even though the complaint does not allege a patent law violation as basis for recovery,[5] and those cases that hold that the Federal Circuit has no jurisdiction over a case raising patent issues when the complaint does not seek relief directly under patent laws.[6]

I. The Petition Raises An Important Issue of Federal Law Which Has Not Been Decided By This Court

The assignment to the Federal Circuit of *exclusive* jurisdiction over patent cases is designed to ensure greater uniformity in patent law and to avoid forum shopping. See S. Rep. No. 275, 97th Cong., 2d Sess. 5-6, reprinted in 1982 U.S. Code Cong. & Admin. News, 15-16. Indeed, Congress' intent in defining the class of cases to which this exclusive jurisdiction applied was clearly stated at the time the statute was enacted:

> The [Federal Circuit's] appellate jurisdiction in patent cases is defined in relation to the district court's jurisdiction; that is, if the district court has jurisdiction over the case under 28 U.S.C. § 1338(a), on the ground that the case arises under the patent law, the appeal in that case will go to the new appellate court instead of the regional circuit.

H.R. Rep. No. 312, 97th Cong., 1st Sess. 23-24, quoted in *Atari, Inc.* v. *JS & A Group, Inc.*, 747 F.2d 1422, 1433 n.7 (Fed. Cir. 1984) (en banc). In short, Congress intended that its goal of advancing uniformity and avoiding forum shopping would be served best by employing the simple standard of assigning to the Federal Circuit all appeals in cases where jurisdiction in the district court, in whole or in part, "arises under" the patent laws. See *Atari*, 747 F.2d at 1429-1430; *Christianson* v.

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[5] *Christianson* v. *Colt Industries Operating Corportaion*, 798 F.2d 1051 (7th Cir. 1986).

[6] *Christianson* v. *Colt Industries Operating Corporation*, 822 F.2d 1544 (Fed. Cir. 1987), petition for cert. pending, No. 87-499 (filed Sept. 23, 1987).

Colt Industries, 822 F.2d 1544, 1553-1554 (Fed. Cir. 1987). The scope of Section 1295(a)(1) is stated succinctly in *Christianson:* "[i]n sum, what counts is not the mere presence or absence of patent 'issues'; what counts is whether the district court's jurisdiction was based in whole or in part on section 1338." *Christianson*, 822 F.2d at 1553.

Thus, jurisdiction over an appeal of a case arising under the patent laws depends not on any post-hoc characterization of the issues in the case—or on any standards of judicial comity or convenience—but simply on the nature of the case as reflected in the complaint filed in the district court. Congress clearly intended the term "arising under" the patent laws to be understood "in the same sense that cases are said to 'arise under' federal law for purposes of federal question jurisdiction." House Report, at 41; see *Handgards, Inc.* v. *Ethicon, Inc.*, 743 F.2d 1282, 1286 n.3. (9th Cir., 1984). Thus, in determining the Federal Circuit's jurisdiction, the *only* question is whether—under the "well-pleaded complaint rule"—the complaint in the case under appeal may be fairly read to include a claim under the patent laws. See *Franchise Tax Board of California* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 9 (1983) (well pleaded complaint rule); *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149 (1908) (same).

Petitioner's claims in the original complaint unquestionably arose under the patent laws. The gist of the complaint was a claim for patent infringement. See Complaint, App., *infra*, 20a-23a. Therefore, jurisdiction over the appeal in this case lies exclusively in the Federal Circuit, and the Third Circuit clearly erred in accepting the Federal Circuit's transfer to it of jurisdiction. In ignoring Congress' express jurisdictional command, and incorporating notions of judicial comity and efficiency into the jurisdictional issue, the Third Circuit and the Federal Circuit have revived the potential for inter-

circuit conflicts in patent law, and the concomitant forum shopping that accompanies such conflicts. These are concerns Congress intended to lay to rest in the Federal Courts Improvement Act of 1982. See S. Rep. No. 275, 97th Cong., 2d Sess. 5-6. It simply does not lie within the prerogative of those courts to be making such decisions based on judicial comity once Congress has made the determinative judgment.

By undermining Congress' clear purpose, the courts of appeals have incorrectly decided an important question of potentially broad impact. *Cf. United States* v. *Hohri*, 107 S.Ct. 2246, 2249 (1987). Indeed, the Seventh Circuit, in considering a similar issue of jurisdiction in patent appeals in *Christianson*, 798 F.2d at 1058 n.10, noted a "burgeoning list of cases delineating, at considerable expense to the parties and the judicial system and no doubt considerable bewilderment to laymen, the boundaries of 28 U.S.C. § 1295(a)(1)." This Court should grant the petition to resolve this jurisdictional issue.

II. The Decision Below Conflicts With Decisions of Other Courts of Appeals

The decision below gives rise to clear conflicts among the courts of appeals. *First*, most courts that have addressed the issue have concluded, correctly, that the Federal Circuit's exclusive jurisdiction only extends to cases "arising under" the patent statute. See, *supra*, pp. 5-7; *Atari*, 747 F.2d at 1429-1430; *Kidde, Inc. v. E.F. Bavis & Associates, Inc.*, 735 F.2d 1085 (8th Cir. 1984). Consistent with this position, other courts have recognized that cases raising patent issues—but not "arising under" the patent laws—are not within the jurisdiction of the Federal Circuit and must be decided by the regional courts of appeals. See *Gilson* v. *Republic of Ireland*, 787 F.2d 655 (D.C. Cir. 1986); *Handgards, Inc.* v. *Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984); *Ballard Medical Products* v. *Wright*, 823 F.2d 527 (Fed. Cir.

1987). These courts of appeals have been faithful to Congress' intent in granting patent jurisdiction to the Federal Circuit in Section 1295.[7]

In contrast, both the Third Circuit and the Federal Circuit in the proceedings below reached precisely the opposite conclusion from the one drawn in the cases described above. In the present case, which indisputably "arises under" the patent laws, the Federal Circuit transferred the appeal to the Third Circuit. See *supra*, 4; Complaint, App. *infra*, 20a-23a. The Third Circuit, which lacked jurisdiction over the appeal in this case, because of the Federal Courts Improvement Act, erroneously refused to re-transfer the case to its proper forum and simply affirmed.

Second, the rationale employed by the courts below to justify disregard of the mandatory jurisdictional limitation in Section 1295 also has been expressly rejected by other courts of appeals. In *Professional Managers' Ass'n* v. *United States*, 761 F.2d 740, 744-745 (D.C. Cir. 1985), the court rejected an argument not to transfer a case to the Federal Circuit because it would be more "efficient" for the D.C. Circuit to resolve the issue that had already been fully briefed. What the courts below ignored and the D.C. Circuit correctly recognized is that jurisdictional statutes such as Section 1295 are the "source of [the courts of appeals] authority to resolve disputes, and they cannot be ignored for reasons of either fairness or efficiency." *Id.* at 745. See *Owen Equipment*, 437 U.S. at 374; *United States* v. *Hohri*, 107 S.Ct. at 2245 (Blackmun, J., concurring). The District

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[7] Congress divided authority between the Federal Circuit and the regional circuits on the basis of patent *cases*—not patent *issues*. Under this division of authority, the regional circuits sometimes decide patent issues, and the Federal Circuit "decides all issues, including nonpatent issues, in a 'case' that is properly within its jurisdiction." *Christianson*, 822 F.2d at 1552 (Fed. Cir. 1987).

of Columbia Circuit, unlike the Third and Federal Circuits in the instant case, has quite properly refused to substitute its view of comity and judicial economy for the mandate of Congress.

Finally, at least one other circuit has interpreted the "arising under" standard for jurisdiction of the Federal Circuit in a fashion that is fundamentally at odds with the approach followed by all other Circuits in analyzing jurisdiction under Section 1295(a)(1). The Seventh Circuit has held that the Federal Circuit must take exclusive jurisdiction over any claim in which the plaintiff is "seeking to vindicate a right or interest that would be defeated by one or sustained by the opposite construction of the patent laws." *Christianson* v. *Colt Industries Operating Corp.*, 798 F.2d 1051 (7th Cir. 1986). Under this reasoning, the Seventh Circuit refused to exercise jurisdiction over a case when the complaint sought no relief directly under the patent laws—the classic example of "arising under" jurisdiction—but raised a substantial issue under the patent laws. The Seventh Circuit transferred the appeal raising the substantial patent issues to the Federal Circuit. The Federal Circuit held that the Seventh Circuit's application of the "arising under" standard was too broad and that the Seventh Circuit erred in transferring the case.[8] Under the legal analyses of Section 1295(a)(1) employed by either the Seventh or the Federal Circuit in *Christianson*, it is clear that the Third Circuit in this case lacked jurisdiction over the appeal from the District of Delaware.

Clearly, if this case had arisen in the Seventh, District of Columbia or Ninth Circuits, it would have been re-transferred to the Federal Circuit. Because the prin-

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[8] Nevertheless, the Federal Circuit, after acknowledging that it did not have jurisdiction, erroneously proceeded to address the merits of the case. *Christianson* v. *Colt Industries Operating Corp.*, 822 F.2d 1544 (Fed. Cir. 1987). A petition for certiorari in that case has now been filed. No. 87-499 (Sept. 23, 1987).

ciple that "[c]ourts created by statute can have no jurisdiction but such as the statute confers," *Sheldon* v. *Sill*, 49 U.S. 411, 449 (1850), is fundamental to the proper functioning of the federal judiciary, the ongoing conflict in the courts of appeals raises a substantial issue of federal law which can no longer be ignored. The rights involved here are simply too important to depend on the fortuity of whether they happen to arise in Delaware or Oregon. This petition presents a suitable vehicle for this Court finally to resolve the issue of the proper division of jurisdiction between the Federal Circuit and the regional courts of appeals. Accordingly, this Court should grant certiorari to resolve the issue.

III. The Court Should Grant This Petition Together With The Petition In *Christianson* v. *Colt Industries Operating Corp.*, No. 87-499

Although the *Christianson* case, No. 87-499 (filed Sept. 23, 1987), and the instant petition do not present identical issues—*Christianson* involves the question of whether a case arose under the patent laws and the instant petition involves a case which unquestionably arose under the patent laws—any decision by this Court in *Christianson* would likely affect the proper disposition of this case. Thus, if the Court were to hold, as petitioner contends, that the Federal Circuit has exclusive jurisdiction over all cases arising under the patent laws, then the Third Circuit's decision below should be vacated, based on the court's lack of jurisdiction, and this case remanded for re-transfer to the Federal Circuit.

Accordingly, the Court should seriously consider granting both petitions and consolidating them for argument. The cases present complementary issues under Section 1295(a)(1) and thus present the Court with an opportunity to clarify more fully the appropriate interpretation of the pivotal federal statute governing jurisdiction of all patent litigation in the courts of appeals. At a minimum, the Court should hold this petition pending the

outcome of the *Christianson* case and then dispose of it as appropriate in light of the decision in that case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY BENDER
AARON LEWITTES
JANINE L. BENDER
LEVENTRITT LEWITTES & BENDER
1205 Franklin Avenue
Garden City, N.Y. 11530
(516) 742-4250

ALFRED W. PUTNAM, JR.
DRINKER BIDDLE & REATH
1100 Philadelphia National Bank Building
Philadelphia, Pa. 19107
(215) 988-2700

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

ROBERT K. PAYSON
POTTER ANDERSON & CORROON
350 Delaware Trust Building
Wilmington, Del. 19899
(302) 658-6771

Counsel for Petitioner

* Counsel of Record

October 27, 1987

APPENDICES

Appendix A

United States Court of Appeals for the Federal Circuit

DEVEX CORPORATION, ET AL.,
Plaintiff-Appellant,

vs.

GENERAL MOTORS CORPORATION,
Defendant-Appellee.

No. 86-1523

Judgment

ON APPEAL from the UNITED STATES DISTRICT COURT OF DELAWARE **IN CASE NO(S).** CA 3058

This CAUSE having been heard and considered, it is ORDERED AND ADJUDGED:

TRANSFERRED PURSUANT TO 28 U.S.C. SECTION 1631 TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Dated August 22, 1986

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART, CLERK

ISSUED AS A MANDATE: September 25, 1986

Appendix B

Note: This Order will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

United States Court of Appeals
for the Federal Circuit

DEVEX CORPORATION, et al.,

Appellants,

v.

GENERAL MOTORS CORPORATION,

Appellee.

Appeal No. 86-1523
ON MOTION

Before MARKEY, *Chief Judge*, NEWMAN and BISSELL, *Circuit Judges.*

ORDER

Appellee General Motors Corporation (GM) moves for an order transferring the appeal noticed by appellant Devex Corporation (Devex) to the U.S. Court of Appeals for the Third Circuit. GM argues that the only issue on appeal concerns interest on the postjudgment interest judgment and interest on the cost judgment and is more appropriately heard by the Third Circuit.[1]

Devex opposes the motion to transfer on the ground that, in addition to the interest issue, the appeal concerns a patent damages issue. GM argues that the damages issue

[1] For a history of this litigation, *see Devex Corp. v. General Motors Corp.*, 467 F.2d 257 (3d Cir. 1972), *cert. denied*, 411 U.S. 973 (1973); *Devex Corp. v. General Motors Corp.*, 667 F.2d 347 (3d Cir. 1981), *cert. denied in part*, 456 U.S. 988 (1982), *cert. granted in part, General Motors Corp. v. Devex Corp.*, 461 U.S. 648 (1983); *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020 (3d Cir. 1984), *cert. denied*, 54 U.S.L.W. 3223 (1985).

is a red herring and that Devex is trying, once again, to reopen a damages issue that was decided by the Third Circuit in its 1981 decision.[2]

On March 20, 1984 this court dismissed cross-appeals in this litigation on postjudgment interest issues because the Third Circuit had asserted jurisdiction. This case began in the Third Circuit, which issued two decisions in the case well before this court was created. In 1984 it issued a third decision in the case. The parties' arguments over the presence or absence of particular "issues" remaining are unpersuasive in this case. *See Atari, Inc. v. JS&A Group, Inc.*, 747 F.2d 1422, 1429 (Fed. Cir. 1984) (*in banc*). The Third Circuit has developed a familiarity with this case extending over some fourteen years. The interests of comity and judicial economy are best served by a transfer to that court. *See USM Corporation v. SPS Technologies, Inc.*, 770 F.2d 1035, 1037 (Fed. Cir. 1985); *Atari, supra.*

Accordingly,

IT IS ORDERED THAT:

The appeal is transferred pursuant to 28 U.S.C. § 1631 to the Court of Appeals for the Third Circuit.

22 Aug 86
Date

FOR THE COURT

/s/ Howard T. Markey
Howard T. Markey
Chief Judge

cc: Sidney Bender, Esq.
Arthur G. Connolly, Jr., Esq.

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[2] Certiorari was denied on this issue by the Supreme Court, 456 U.S. 988 (1982). A "Motion for Leave to File Out-of-Time Petition for Rehearing" on the damages issue was also denied by the Supreme Court, 54 U.S.L.W. 3228 (October 7, 1985).

Appendix C

United States Court of Appeals for the Federal Circuit

DEVEX CORPORATION, ET AL.,D,

Appellant,

vs.

GENERAL MOTORS CORPORATION,

Appellee.

Appeal No. 86-1523

Before MARKEY, *Chief Circuit Judge,* NEWMAN and BISSELL, *Circuit Judges.*

ORDER

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT

/s/ Francis X. Gindhart

Francis X. Gindhart, Clerk

9/18/86

Date

cc: Mr. Sidney Bender
Mr. Arthur G. Connolly, Jr.

Appendix D

United States Court of Appeals for the Federal Circuit

DEVEX CORPORATION, ET AL.,

Appellant,

vs.

GENERAL MOTORS CORPORATION,

Appellee.

Appeal No. 86-1523

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

FOR THE COURT

/s/ Francis X. Gindhart

Francis X. Gindhart, Clerk

9/30/86

Date

cc: Mr. Sidney Bender
Mr. Arthur G. Connolly, Jr.

Appendix E

In the United States Court of Appeals for the Third Circuit

DEVEX CORPORATION, TECHNOGRAPH, INC., *et al.*,
Appellant,

v.

GENERAL MOTORS CORPORATION,
Appellee.

No. 86-5771

Appellant's Motion to Transfer Appeal to the Federal Circuit

Appellant Technograph, Inc. filed this appeal in the United States Court of Appeals for the Federal Circuit.[1] The appellee, General Motors, moved that Court to transfer the appeal to this Court pursuant to 28 U.S.C. § 1631, and the Federal Circuit has done so in "[t]he interests of comity and judicial economy." Pursuant to that order (a copy of which is attached hereto as Exhibit "A"),[2] the appeal has now been placed on this Court's docket at No. 86-5771.

Technograph now moves this Court to return the case to the Federal Circuit because it is that Court that has exclusive jurisdiction over this appeal under 28 U.S.C. § 1295(a)(1). As is more fully set forth in the attached memorandum, the question is one of jurisdiction, and not one of "comity and judicial economy." Moreover, it is clear that the Federal

[1] Of the many original plaintiffs below, Technograph is the sole remaining party in interest. *See Devex Corp. v. General Motors Corp.*, 579 F. Supp. 690 (D.Del.), *aff'd*, 746 F.2d 1466 (3d Cir. 1984).

[2] The Federal Circuit has since denied Technograph's motion for rehearing and its suggestion for *en banc* consideration of the transfer order.

Circuit's transfer order is not binding on this Court. *See Christianson v. Colt Industries Operating Corp.*, 798 F.2d 1051 (7th Cir. 1986). Given the want of jurisdiction in this Court, the case must be returned to the Federal Circuit pursuant to 28 U.S.C. § 1631.

Because this motion is submitted on the question of jurisdiction only, and is not addressed to the merits of the appeal, appellant respectfully requests that it be considered prior to briefing and argument on the merits of the case. Appellant also requests an opportunity to be heard on the matter if the Court concludes that argument would be helpful to it, consistent with Third Circuit Rule 11(1).

Respectfully submitted,

Dated: November 13, 1986

/s/ *Alfred W. Putnam, Jr.,*

Alfred W. Putnam, Jr., Esq.
DRINKER BIDDLE & REATH
1100 PNB Building
Broad and Chestnut Streets
Philadelphia, PA 19107
(215) 988-2700

Sidney Bender, Esq.
LEVENTRITT, LEWITTES & BENDER
1205 Franklin Avenue
Garden City, New York 11530
(516) 742-4250

Attorneys for Plaintiff-Appellant

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5771 November 28, 1986
DEVEX CORP., et al.

vs.

GENERAL MOTORS CORP.
Devex Copr., et al., Appellants
(DE D.C. Civil No. 3058)

Present: GIBBONS, STAPLETON and MANSMANN,
Circuit Judges.

1. Appellants' motion to transfer appeal to the U.S. Court of Appeals for the Federal Circuit,
2. Appellee's memorandum opposing motion to transfer appeal to the Federal Circuit,
3. Appellants' reply memorandum in support of motion to transfer, (Due 11-24-86, received on 11-28-86, not filed unless Court directs)

in the above-entitled case.

Respectfully,

/s/ Marta Sanchez
Deputy Clerk
597-3080

The foregoing motion is/~~are~~ *denied.*

By the Court.

/s/ John J. Gibbons
Judge

Dated: December 11, 1986

dt/cc: AWP, Jr.
SB
AGC

Appendix G

IN THE UNITED STATES COURT DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DEVEX CORPORATION, et al.,
Plaintiffs,
v. Civil Action 3058 CMW

GENERAL MOTORS CORPORATION,
Defendant.

CONSOLIDATED

FREDERICK B. ZIESENHEIM, et al.,
Plaintiffs,
v. Civil Action 83-567 CMW

TECHNOGRAPH, INC.,
Defendant.

Robert K. Payson, Esquire of Potter, Anderson & Corroon, Wilmington, Delaware.
OF COUNSEL: Sidney Bender, Esquire, Aaron Lewittes, Esquire and Janine L. Bender, Esquire of Leventritt, Lewittes & Bender, Garden City, New York
Attorneys for Defendant, Technograph, Inc., in Civil Action 83-567.

Arthur G. Connolly, Esquire and Arthur G. Connolly, Jr., Esquire of Connolly, Bove, Lodge & Hutz, Wilmington, Delaware.
OF COUNSEL: William A. Schuetz, Esquire of Detroit, Michigan; George E. Frost, Esquire of Barnes, Kisselle, Raisch, Choate, Whittemore & Hulbert, Birmingham, Michigan.
Attorneys for Defendant, General Motors Corporation in Civil Action 3058.

OPINION

Wilmington, Delaware
June 27, 1986

Appendix G

WRIGHT, Senior Judge:

This patent litigation has been before this Court for more than twenty years, has generated numerous opinions and appeals, and threatens to outlast all human participants. Currently pending is the motion of plaintiff Technograph, Inc., for a reasonable royalty and prejudgment interest in relation to previously determined infringement for non-bumper parts, and for additional interest on an award of postjudgment interest previously granted by this Court.

The Court will not set out the protracted history of this dispute because it has been reported extensively, *see, e.g.*, 494 F.Supp. 1369 (D.Del. 1980); 569 F.Supp. 1354 (D.Del. 1983), *aff'd* 749 F.2d 1020 (3d Cir. 1984), and because the current motion focuses on two limited issues. The Court instead will relate separately the relevant background on each prong of plaintiff's motion.

I. REASONABLE ROYALTY AWARD

The patent at issue here involved a process for cold-forming steel products, which defendant General Motors Corp. ("G.M.") used to produce both bumper and non-bumper parts. Following a finding of infringement, *see* 467 F.2d 257 (3d Cir. 1972), an accounting of damages was conducted before a Special Master. The Master awarded substantial damages for bumper part infringement, but concluded that the proof was too speculative to allow an award of damages for non-bumper part infringement. This Court approved the Master's Findings and Conclusions on non-bumper damages, *see* 494 F.Supp. 1369, 1377-78 (D.Del. 1980).

The Third Circuit affirmed the decision not to award damages for non-bumper parts, finding that plaintiff had failed to provide credible evidence from which a reasonable royalty for infringement could be calculated. 667 F.2d 347,

362 (3d Cir. 1981). Plaintiff filed a petition for certiorari with the U.S. Supreme Court, arguing that the failure to award damages after a finding of infringement in the production of non-bumper parts violated the mandate of 35 U.S.C. § 284.[1] The Supreme Court denied *cert.*, *see* 456 U.S. 990 (1982). The Court did consider G.M.'s petition on the issue of prejudgment interest on the damages award for bumper-part infringement and affirmed the award. 461 U.S. 648 (1983).

After this Court's rulings on postjudgment interest and interests on costs were affirmed by the Third Circuit, *see* 749 F.2d 1020 (1984), plaintiff filed a petition for certiorari on the postjudgment interest issue which also raised the issue of a damages award for non-bumper parts infringement. The basis for this petition was the alleged conflict between the Third Circuit's 1981 ruling in this case and decisions of the Federal Circuit rendered in 1983. *See* 53 U.S.L.W. 3839 (U.S. May 13, 1985) (No. 84-1795). The Supreme Court again denied the petition. *See* 54 U.S.L.W. 3223 (U.S. Oct. 7, 1985).

Plaintiff's argument here appears similar to that made to the Supreme Court in the second *cert.* petition: namely, that a conflict exists between the 1981 Third Circuit decision refusing to grant a royalty award for non-bumper part infringement and later decisions of the Federal Circuit.[2] Plaintiff argues that this Court still retains juris-

[1] This section states: "Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, . . . "

[2] Those cases are *Stickle v. Heublein, Inc.*, 716 F.2d 1550 (Fed.Cir. 1983); *Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075 (Fed.Cir. 1983); and *Railroad Dynamics, Inc. v. A. Stucki Co.*, 727 F.2d 1506 (Fed.Cir. 1984); *see also, Armco, Inc. v. Republic Steel Corp.*, 707 F.2d 886 (6th Cir. 1983). Plaintiff

(*footnote continued on following page*)

diction over this case and this issue, despite the previous appeals, and that the Court has the power under the law of the case doctrine to recognize the supervening change of law and "correct" the Third Circuit's mistake.

For the sake of argument, the Court will assume that the first two steps of plaintiff's reasoning are correct: the 1981 Third Circuit decision conflicts with later appellate decisions, and this Court retains jurisdiction to reopen the question of a royalty award for infringement in the production of non-bumper parts.[3] Nevertheless, the Court cannot grant plaintiff's request and act on the supervening change of law under the law of the case doctrine.

As a general matter, a court can reconsider a previous ruling when a supervening decision has changed the applicable rule of law. *See, e.g., Zichy v. City of Philadelphia*, 590 F.2d 503, 508 (3d Cir. 1979); *Al Haddad Bros.*

(*footnote continued from preceding page*)

interprets those cases as requiring a court always to award at least a reasonable royalty and prohibiting the denial of any award where the court finds infringement of a valid patent.

[3] The Court has serious doubts about both of these assumptions. Regarding the alleged conflict between the Third Circuit and Federal Circuit decisions, this Court notes the Federal Circuit's recent statement on proof of damages: "One who fails to submit evidence in support of a position cannot be heard on appeal to complain that the trial court failed to find facts upholding that position." *Railroad Dynamics, Inc. v. A. Stucki Co.*, 727 F.2d 1506, 1519 (Fed.Cir. 1984). In addition, plaintiff's reliance on G.M.'s supposed concession in its latest Supreme Court brief that "*Stickle* is now controlling" is simply beside the point. Plaintiff has taken this statement out of context.

Regarding the Court's continuing jurisdiction over this issue, it appears that a matter which has been decided by the district court, affirmed by the Court of Appeals, and denied certiorari by the Supreme Court generally is no longer *sub judice* in the district court. *See Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, §37 (3d Cir. 1982) (motion under Fed.R.Civ.P. 60(b)(6)); *Eutectic Corp. v. Metco, Inc.*, 597 F.2d 32, 34 (2d Cir. 1979) (same).

Enterprises, Inc. v. M/S Agapi, No. 82-92, slip op. at 5 (D.Del. May 8, 1986). However, a trial court's power to reconsider a question is very limited after the appeals court has issued a mandate on the question and the matter is again before the trial court on remand or other subsequent proceedings. The proper course for plaintiff to follow if it believes that subsequent decisions have cast doubt on the correctness of the Third Circuit's 1981 ruling on non-bumper parts is to apply to the Third Circuit for a modification or recall of its mandate. *See Riley v. MEBA Pension Trust*, 586 F.2d 968, 972 (2d Cir. 1978); *Elias v. Ford Motor Co.*, 734 F.2d 463, 465-66 (1st Cir. 1984); IB J.Moore, Moore's Federal Practice ¶ 404[10], at 171-172 (2d ed. 1984). This Court's acceptance of plaintiff's invitation to "reverse" the Third Circuit surely would invite a later reversal from that court.[4]

In addition to its "law of the case argument", Technograph claims that its motion on the non-bumper parts issue is proper under Fed.R.Civ.P. 60(b)(6). This provision allows a court to relieve a party from a final judgment or order for "any other reason justifying relief from the operation of the judgment." In *Seese v. Volkwagenwerk, A.G.*, 679 F.2d 336 (3d Cir. 1982), the district court had denied a rule 60(b)(6) motion seeking relief from the Third

[4] In *Morrow v. Dillard*, 580 F.2d 1284, 1297 (5th Cir. 1978), the circuit court found that the district court properly reconsidered its grant of attorneys' fees on remand because of an intervening Supreme Court decision on the question. *Morrow* is distinguishable for two reasons. The original Fifth Circuit decision in *Morrow* did not directly address the attorneys' fee issue, whereas the Third Circuit did address directly the non-bumper parts royalty issue. Second, the intervening decision in *Morrow* came from the Supreme Court and directly conflicted with prior law. In contrast, here the intervening decisions came from a court coordinate to the Third Circuit and may not conflict with the Third Circuit decision, *see supra* note 3.

Circuit mandate in thie case because of a subsequent holding by the Fourth Circuit in direct opposition to the Third Circuit's original decision. The Third Circuit had denied rehearing after the Fourth Circuit decision, and the Supreme Court denied certiorari. The Third Circuit affirmed denial of the Rule 60(b)(6) motion: "The district court is without jurisdiction to alter the mandate of this Court on the basis of matters included or includable in defendant's prior appeal." *Id.* at 337.

Technograph seeks to distinguish *Seese* on the ground that the supervening Federal Circuit decisions, *see supra* note 2, were not "matters included or includable" in its prior appeal because they were rendered after the Third Circuit decision on the non-bumper parts issue. The Court rejects this argument and finds *Seese* controlling. Although the 1983 Federal Circuit decisions could not have been brought up to the Third Circuit in 1981, they were included in one of plaintiff's prior appeals—the 1985 certiorari petition on which the Supreme Court denied review.[5] Plaintiff's invocation of Rule 60(b)(6) to seek review of the Third Circuit's "error" is improper. *See Eutectic Corp. v. Metco, Inc.*, 597 F.2d 32, 34 (2d Cir. 1979) (rule 60(b)(6) motion cannot be used as substitute for appeal).

In addition, plaintiff admits that determination of the motion is a matter of the court's discretion. The Court will exercise that discretion and deny the motion. Plaintiff has had an abundance of opportunities to make its case for a royalty award on non-bumper parts—before the Special Master, this Court, the Third Circuit, the Supreme Court in 1982 and the Supreme Court in 1985—and the issue consistently has been determined against it. This

[5] *Standard Oil Co. v. United States*, 429 U.S. 17 (1976) (per curiam) is distinguishable for the same reason. *See Seese*, 679 F.2d at 337 n.1.

Court will reconsider the matter only if directed to do so by a higher court.

II. Additional Postjudgment Interest

On August 22, 1983, this Court issued an opinion requiring G.M. to pay postjudgment interest on the damage award at the rate of sixteen percent per annum, 569 F.Supp. 1354. On August 30, 1983, G.M. paid into court $7,170,344.39, representing the full amount of postjudgment interest, at sixteen percent, to that date. On September 9, 1983, this Court entered an Order awarding postjudgment interest at sixteen percent against G.M. in the amount of $7,170,344.39, of which $2,688,879.15 was transferred immediately to Technograph. Docket No. 724.[6] The $2.6 million represented interest at six percent per annum, which G.M. admitted it owed; the remaining $4,481,465.24 represented interest at ten percent per annum (the difference between six and sixteen percent), which G.M. disputed it owed to Technograph. The Court did not permit distribution of the $4.4 million at that time to prevent its possible dissipation by Technograph before final appellate determination of the appropriate rate of interest (six percent vs. sixteen percent). *See* Transcript of September 7, 1983, Hearing ("Transcript"), at 2, 12, 13, Docket No. 725.

On December 1, 1983, this Court ordered G.M. to pay $71,262.43 to Technograph as sixteen percent interest on the allowed costs, 577 F.Supp. 429. That amount also was deposited in Court but not released to plaintiff, *see* Docket No. 762, because G.M. claimed that no interest should be awarded on costs. The $4.4 million in postjudgment interest and $71,262.43 in interest on costs ("the funds")

[6] Approximately $484,000 of the $2.6 million also was withheld by the Court because its ownership was disputed among the plaintiffs. Technograph later received this money with accrued interest. *See* Docket No. 773.

were deposited in an account in the name of the "Clerk of the Court of the U.S. District Court for the District of Delaware, C.A. No. 3058", to be invested in insured money market accounts or U.S. Treasury bills, at the direction of plaintiff. *See* Docket No. 717. The funds accrued interest at the market rate, which was less than sixteen percent.

The Third Circuit on November 28, 1984, affirmed this Court's award of sixteen percent postjudgment interest and award of interest on costs, 749 F.2d 1020, 1026-27. This Court approved a stipulation on November 15, 1985, allowing distribution of the $4.4 million and $71,262.43 (plus accrued interest) to Technograph.

Technograph now seeks to recover additional money from G.M. representing the difference between the market-rate interest earned on the funds and the sixteen percent rate of interest awarded by the Court in its September 9, 1983, and December 1, 1983, Orders. Technograph claims that those orders created liquidated amounts equivalent to a judgment, which went unpaid because it did not have complete access to the funds. Postjudgment interest at sixteen percent therefore accrued on the funds until Technograph finally received them November 15, 1985. In addition, Technograph argues that the November 15, 1985, payment must be applied first to accrued interest and then to principal under the "United States" rule, so that a portion of the principal (approximately $660,000) remains unpaid and still is accruing interest at sixteen percent.

Resolution of this matter turns on how G.M.'s payment of the funds into Court is construed. G.M. argues that its payments were made, in effect, under Fed.R.Civ.P. 67, so that its obligation to pay additional interest was dis-

charged.[7] Plaintiff claims that G.M.'s payment was intended as a supersedeas bond under Fed.R.Civ.P. 62(d).[8] No motion under either rule was filed, and this Court's Orders of September 9, 1983, and December 16, 1983, do not specify why the funds were not paid directly to plaintiff. At the September 1983 hearing on the payment, G.M. withdrew its request that the judgment on postjudgment interest be marked satisfied in response to plaintiff's opposition. Transcript at 24.

G.M.'s payments into court served as actual payment of the postjudgment interest judgment, rather than as a supersedeas bond for a stay pending appeal. G.M. paid the funds (representing all postjudgment interest and interest on costs owed) into court, and this Court accepted them, with the understanding that the payments extinguished G.M.'s obligation to pay postjudgment interest and interest on costs. This Court determined that G.M. was liable to the plaintiff, required that payment be made, and ordered that the funds be deposited in a bank account set up in the name of the Clerk of the Court. G.M. had no control over the funds once they were paid into court. Technograph controlled how the funds were invested, and the Court controlled distributions from the account. *See* Docket No.

---

[7] Rule 67 provides:

> In an action in which any part of the relief sought is a judgment for a sum of money . . . , a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing . . . . The fund shall be deposited in an interest-bearing account or invested in an interest-bearing instrument approved by the court.

[8] That provision states: "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay . . . . The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be."

717. G.M. owes no additional postjudgment interest or interest on costs. *Cf. International Telemeter Corp. v. Hamlin Int'l Corp.*, 754 F.2d 1492, 1495 (9th Cir. 1985) (postjudgment interest at statutory rate owed on funds in escrow account established by agreement of parties, over which debtor retained investment control); *Reliable Marine Boiler Repair, Inc. v. Mastan Co.*, 325 F.Supp. 58, 64 (S.D.N.Y. 1971) (plaintiff not entitled to interest on funds in possession of court).[9]

For the foregoing reasons, the Court denies plaintiff's Motion for an Award of Interest and for a Reasonable Royalty Award on Non-Bumper Parts. An Order will enter in conformity with this Opinion.

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[9] The actions of G.M. also suggest that it did not intend the $4.4 million payment to serve as as supersedeas bond. It paid the money before it filed an appeal and even before it was ordered to pay. Rule 62(d) requires that the bond be given "at or after" the time of filing the notice of appeal. G.M.'s counsel also stated that its payment provided plaintiffs with "much more protection than they would have by a supersedeas bond . . . . " Transcript at 2, indicating that the payment was intended as something other than a supersedeas bond. This Court would not have required G.M. to provide a supersedeas bond because of the company's vast assets.

United States v. Los Angeles Soap Co., 153 F.2d 320 (9th Cir. 1946), on which plaintiff relies, is distinguishable. The monies paid into court there were designated by the court as "security" for the disputed tax liability, 153 F.2d at 321. This Court did not designate G.M.'s payments as security for anything, nor intend them to serve as such.

Appendix H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DEVEX CORPORATION, et al.,
Plaintiffs,
v. Civil Action 3058 CMW

GENERAL MOTORS CORPORATION,
Defendant.

CONSOLIDATED

FREDERICK B. ZIESENHEIM, et al.,
Plaintiffs,
v. Civil Action 83-567 CMW

TECHNOGRAPH, INC.,
Defendant.

ORDER

This 27th day of June 1986, for the reasons stated in the accompanying Opinion,

IT IS HEREBY ORDERED that Technograph's Motion for Award of Interest and for Reconsideration of Judgment with respect to Non-Bumper Parts is denied.

/s/ Caleb M. Wright

UNITED STATES DISTRICT CT. JUDGE

Appendix I

IN THE UNITED STATES COURT,

For the Northern District of Illinois

Civil Action No.....

Devex Corporation, a Corporation of Ohio; William C. McCoy, 524 Bulkley Building, Cleveland 15, Ohio; and Theodore A. TeGrotenhuis, 524 Bulkley Building, Cleveland 15, Ohio.

Plaintiffs,

vs.

General Motors Corporation, a Corporation of Delaware; and Metal Lubricants Co., a Corporation of Illinois,

Defendants.

56 C 1912
(For Infringement of United States Patent
Letters Patent Reissue No. 24,017).

COMPLAINT

The Plaintiffs, complaining of the Defendants, allege:

I.

This is a civil action for patent infringement. The jurisdiction of the Court in this action arises under the Patent Laws of the United States.

II.

Plaintiff Devex Corporation is an Ohio Corporation, with its principal office at 1296 Hall Avenue, Lakewood 7, Ohio; Plaintiffs William C. McCoy and Theodore A. TeGrotenhuis are citizens of the State of Ohio, with offices at 524 Bulkley Building, Cleveland 15, County of Cuyahoga and State of Ohio.

Appendix I

III.

The Defendant General Motors Corporation is a corporation organized and existing under the laws of the State of Delaware, and it is domesticated in Illinois and qualified as a foreign corporation to do business in the State of Illinois. This Defendant has several regular and established places of business in Illinois, including regular and established places of business in the City of Chicago and within the Northern District of the State of Illinois; and this Defendant has committed acts of infringement herein complained of in the Northern District of Illinois as well as elsewhere in the United States.

IV.

The Defendant Metal Lubricants Co. is a corporation organized and existing under the laws of the State of Illinois, and it has a regular and established place of business at 3211 South Wood Street, Chicago 8, Illinois. This Defendant has committed acts of infringement herein complained of in the Northern District of Illinois.

V.

On March 4, 1952, United States Letters Patent No. 2,588,234 were duly and lawfully issued to John A. Henricks of Lakewood, Ohio for an invention in a method of coating and drawing metal. On June 7, 1955, Letters Patent Reissue No. 24,017 were duly and lawfully issued to John A. Henricks for the same invention.

VI.

By an assignment effective as of February 1, 1949, and dated August 22, 1955, the inventor of Letters Patent Reissue No. 24,017, John A. Henricks, assigned said patent to Plaintiff Devex Corporation. By an assignment dated September 10, 1955, Plaintiff Devex Corporation assigned said patent to Plaintiffs William C. McCoy and Theodore A. TeGrotenhuis. Plaintiff Devex Corporation,

however, retained certain reversionary rights therein which it now has.

VII.

Except for certain rights retained by Plaintiff Devex Corporation, Plaintiffs William C. McCoy and Theodore A. TeGrotenhuis are the owners of Letters Patent Reissue No. 24,017.

VIII.

The Defendant, General Motors Corporation, has infringed and is continuing to infringe the Letters Patent Reissue No. 24,017 by drawing and deforming metal according to the process described and claimed therein. Defendant General Motors Corporation has been fully informed with regards to said patent and its infringement thereof, but has nevertheless continued to infringe the same.

IX.

The Defendant, Metals Lubricants Co., has promoted the infringement of Letters Patent Reissue No. 24,017 by Defendant General Motors Corporation by agreeing to hold Defendant General Motors Corporation harmless from any patent liability that may be involved in its use of the process claimed and described in said patent. Defendant Metal Lubricants Co. has been informed with regards to said patent.

X.

By reason of the infringement of the Defendants, Plaintiffs have been seriously damaged and injured.

Wherefore, Plaintiffs pray:

(a) For an accounting to establish their damages against each Defendant; that the damages so found be trebled; and

for judgment against the Defendants according to their respective liabilities;

(b) For reasonable attorneys' fees unjustifiably caused them;

(c) For an assessment of costs against each of the Defendants; and

(d) For such other and further relief as may be required and appropriate in the premises.

Devex Corporation
William C. McCoy, and
Theodore A. TeGrotenhuis,
By /s/ Frank H. Marks
Frank Marks
Lederer, Livingston, Kahn & Adsit,
120 South LaSalle Street,
Chicago 3, Illinois,
Attorneys for Plaintiffs.

/s/ William C. McCoy,
William C. McCoy

/s/ T. A. TeGrotenhuis,
T. A. TeGrotenhuis,
524 Bulkley Building,
Cleveland 15, Ohio.
Of Counsel for Plaintiffs

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5771

DEVEX CORPORATION, TECHNOGRAPH, INC., WILLIAM C. McCOY, THEODORE A. TE GROTENHUIS, FREDERICK B. ZIESENHEIM, MARJORIE TE GROTENHUIS, WILLIAM C. McCOY, JR., and KATHERINE M. BASSETT,

Appellants

v.

GENERAL MOTORS CORPORATION

Appeal from the United States District Court
for the District of Delaware

(D.C. Civil No. 3058)

District Judge: Honorable Caleb M. Wright

Submitted Pursuant To Third Circuit Rule 12(6)
June 25, 1987

Before: GIBBONS, *Chief Judge*, WEIS, *Circuit Judge*, and POLLAK,* *District Judge*.

---

* The Honorable Louis H. Pollak, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Appendix J

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court entered June 27, 1986 be and the same is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

/s/ Weis
Circuit Judge

Attest:

/s/ Sally Mrvos
Clerk

Date: Jun. 29, 1987

Supreme Court, U.S.
FILED
NOV 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-682

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TECHNOGRAPH LIQUIDATING TRUST,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

RESPONDENT GENERAL MOTORS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ARTHUR G. CONNOLLY, JR.*
CONNOLLY, BOVE, LODGE & HUTZ
1220 Market Building
Post Office Box 2207
Wilmington, Delaware 19899
(302) 658-9141
Attorneys for General Motors Corp.

Of Counsel:
ARTHUR G. CONNOLLY, ESQUIRE
CONNOLLY, BOVE, LODGE, & HUTZ
1220 Market Building
Post Office Box 2207
Wilmington, Delaware 19899
(302) 658-9141

WILLIAM A. SCHUETZ, ESQUIRE
GENERAL MOTORS PATENT SECTION
3031 W. Grand Boulevard
Detroit, Michigan 48232
(313) 974-1306

GEORGE E. FROST, ESQUIRE
BARNES, KISSELLE, RAISCH, CHOATE, WHITTEMORE & HULBERT, PC
Suite 328 Birmingham Place
401 S. Woodward Avenue
Birmingham, Michigan 48011
(313) 540-9767

*Counsel of Record

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED
(Affirmatively Stated)

1. The decision below will not affect anyone other than the parties to this thirty-one year old lawsuit, which the District Court noted "threatens to outlast all human participants" (10a).[1] The facts of this case do not lend themselves to a definitive ruling by the U.S. Supreme Court establishing bright line boundaries under 28 U.S.C. §1295(a)(1) for the jurisdiction of the Federal Circuit, since all issues arising under the patent laws were finally adjudicated prior to the creation of the U.S. Court of Appeals for the Federal Circuit in October 1982. The issues raised in the Petition are thus of no public importance.

2. The decisions of both the Federal Circuit and the Third Circuit that the appeal should be heard in the Third Circuit are consistent and logical and not in conflict with decisions of other Courts of Appeal. The weakness of petitioner's position is shown by its bootstrap suggestion that certiorari should be granted in the totally unrelated case of *Christianson v. Colt Industries Operating Corporation*, 822 F.2d 1544 (Fed. Cir. 1987), petition for cert. pending, No. 87-499 (filed September 23, 1987), and that this case should tag along with *Christianson, Id.*

3. The decision below does not deal with issues worthy of certiorari. The Federal Circuit was correct in transferring the appeal to the Third Circuit pursuant to 28 U.S.C. §1631 and the Third Circuit was correct in refusing to transfer the case back to the Federal Circuit because there was no jurisdiction in

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[1] (___ a) references are to pages of Petitioner's Appendix.

the Federal Circuit; all patent issues in the litigation having been finally adjudicated prior to 1982. As required by §1631, it was in the interest of justice not to burden the Federal Circuit with the responsibility of studying an ancient and enormous record, when the Third Circuit had already decided three previous appeals involving all patent and some nonpatent issues.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-682

TECHNOGRAPH LIQUIDATING TRUST,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

RESPONDENT GENERAL MOTORS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

A.

Petitioner appealed from the June 27, 1986 decision of the U.S. District Court for Delaware to the U.S. Court of Appeals for the Federal Circuit. GM's motion under 28 U.S.C. §1631 to transfer the appeal to the U.S. Court of Appeals for the Third Circuit was granted by the Federal Circuit. Petitioner's motion in the Federal Circuit for reargument of the transfer motion and its suggestion that the motion be reheard

en banc were each denied. Petitioner's motion in the Third Circuit seeking transfer back to the Federal Circuit was also denied (la-8a).

Petitioner filed petitions for writs of certiorari from the Federal Circuit's Order transferring the case to the Third Circuit and from the Third Circuit's refusal to transfer the appeal back to the Federal Circuit. Both of these petitions were denied by this Court (55 USLW 3601 (March 9, 1987)) and the Third Circuit on June 29, 1987 affirmed the decision of the District Court (24a-25a). This is the third time petitioner has sought certiorari to review the same jurisdictional question.

B.

This case has been pending for over thirty years. It involved a patent which expired over eighteen years ago. There have been three separate trials (validity—infringement—accounting); five appeals and nine petitions for certiorari.

The subject matter of petitioner's latest appeal from the Delaware District Court involves a non-patent issue—whether petitioner is entitled to additional interest on postjudgment interest previously paid into Court by GM. Petitioner also attempted to reopen and review the Third Circuit's 1981 judgment holding that petitioner was not entitled to damages relating to GM's production of non-bumper parts.

The Third Circuit had, prior to the latest appeal, already heard and decided the following three appeals from the District Court in this thirty-one year old litigation:

1. *Devex Corp. v. General Motors Corp.*, 467 F.2d 257 (3d Cir. 1972), *cert. denied*, 411 U.S. 973 (1973) ruled (prior to the October 1982 establishment of the Federal Circuit) on the patent infringement issues.[2]

2. *Devex Corp. v. General Motors Corp.*, 667 F.2d 347 (3d Cir. 1981) affirmed (prior to October 1982) the District Court's "Final Judgment" awarding over $8.8 million for bumper part infringements, over $11 million in prejudgment interest and denying damages relating to non-bumper parts. Certiorari was granted on the prejudgment interest issue and the Third Circuit's decision was affirmed by this Court, *General Motors Corp. v. Devex Corp.*, 461 U.S. 648 (1983). Certiorari was denied the present petitioner on the non-bumper parts damages issue, 456 U.S. 988 (1982).

3. *Devex Corp. v. General Motors Corp.*, 749 F.2d 1020 (3d Cir. 1984) affirmed a ruling awarding petitioner over $7 million in postjudgment interest and interest on costs and denying petitioner so-called delay damages/compound interest on the postjudgment interest. This appeal was decided by the Third Circuit in 1984 after the Federal Circuit was created—every patent issue had already been decided. Petitioner conceded in its last petition for a writ of certiorari that the Third Circuit had jurisdiction over the appeal dealing with postjudgment interest because "[t]here were no patent law issues involved in the appeal." (Petition in No. 86-1179, p. 5). This conces-

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[2] The trial and appeal of the validity issues were in the U.S. District Court for the Northern District of Illinois and the U.S. Court of Appeals for the Seventh Circuit (*Devex Corp. v. General Motors Corp.*, 321 F.2d 234 (7th Cir. 1963), *cert. denied*, 375 U.S. 971 (1964)). On petitioner's motion, the case was transferred from Chicago to Delaware in 1965.

sion is diametrically opposed to petitioner's present position that the Federal Circuit has exclusive jurisdiction over another postjudgment interest claim—and that it also has jurisdiction to review the 1981 final judgment of the Third Circuit on non-bumper damages.

(a) Certiorari was denied on petitioner's attempt to obtain delay damages/compound interest on postjudgment interest and also on petitioner's attempt to reopen the issue of damages for non-bumper parts infringement, 106 S.Ct. 68 (1985). In addition to the petition for certiorari, petitioner also filed in this Court a "Motion for Leave to File Out-Of-Time Petition for Rehearing" on the non-bumper parts damages issue. This was also denied. 54 USLW 3228 (October 7, 1985).

C.

Early in 1986, petitioner filed a motion in the District of Delaware seeking additional interest on the postjudgment interest judgment and the interest on cost judgment that GM had paid into the District Court in 1983, pending the earlier appeal on these matters to the Third Circuit. Since the District Court still supposedly had this tag-end interest issue before it, petitioner also suggested that the District Court had the power to re-examine and reverse the Third Circuit's 1981 decision on the non-bumper parts damages issue. Petitioner's motions were denied by the District Court on June 27, 1986.

As noted, this is the third petition for a writ of certiorari filed by petitioner on the question of whether the appeal from the District Court's June 27, 1986 rulings should have been heard in the Third

Circuit or in the Federal Circuit. Petitioner hopes to forum shop and obtain another "bite of the apple" by resurrecting in the Federal Circuit its oft rejected arguments that it is entitled to damages concerning non-bumper parts. These arguments have already been unsuccessfully presented to the District Court, the Third Circuit and this Court on numerous occasions.

REASONS FOR DENYING THE WRIT

1.

The transfer by the Federal Circuit to the Third Circuit and the Third Circuit's refusal to transfer the case back to the Federal Circuit affects no one but the parties to this lawsuit and will not serve as precedent for future cases. The Third Circuit decided two appeals in this case prior to 1982 dealing with infringement, damages and prejudgment interest. One of these appeals included the non-bumper parts damages issue. The Third Circuit also heard an appeal in 1984 dealing with delay damages/compound interest on postjudgment interest. Since October 1982, the Federal Circuit has had jurisdiction over appeals in cases from federal district courts involving continuing issues arising under the patent laws. The factual situation in this case where appeals on all patent issues were decided by a regional court of appeals prior to 1982 and still further appeals in the litigation are filed after 1982 is transitory and unlikely to occur again as we move further in time from 1982. Even in 1983 the Federal Circuit referred to such situations as "transitory". *Central Soya Co., Inc. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1580 (Fed.Cir. 1983).

The facts of this case do not present this Court with an opportunity to provide lasting guidelines for

whether appeals should go to the Federal Circuit or to a regional court of appeals. The issues raised in the petition are "episodic" and "academic" and are of no public importance. They do not warrant review by the Supreme Court. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

Indeed, the Order of the Federal Circuit transferring the appeal to the Third Circuit stated (2a):

> NOTE: This Order will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

2.

A.

Petitioner exposes the weakness of its position by seeking to couple this petition with the one in *Christianson v. Colt Industries Operating Corp.*, No. 87-499 (filed Sept. 23, 1987). But that case involves totally unrelated issues and stands in stark contrast to this one.

—In *Christianson*, there was a vigorous disagreement on the jurisdictional issue between the Federal Circuit and the Seventh Circuit. Here the Federal Circuit and the Third Circuit are in complete accord.

—In *Christianson*, there were substantial patent issues still present in the case and there had been no prior appeals. Here, all patent issues were finally adjudicated prior to October 1982 and there were three earlier appeals to the Third Circuit.

—In *Christianson*, a ruling by the U.S. Supreme Court might provide permanent guidance for future

cases where a complaint seeks no direct relief under the patent laws but resolution of the litigation will deal with substantial patent issues. Here, a ruling will deal with what is at most a transitory situation that will never again occur.

—In *Christianson*, one of the "Questions Presented" is "[w]hether a U.S. Court of Appeals may rule on the merits of an appeal when it expressly rules that it does not have subject matter jurisdiction pursuant to statute." Here, there was no ruling by the Federal Circuit or the Third Circuit that the Third Circuit did not have subject matter jurisdiction.

To consolidate this case with *Christianson*, *Id.*, would complicate rather than clarify the jurisdictional issues presented in *Christianson*. Furthermore, large portions of the petition in *Christianson* deal with issues other than jurisdiction—i.e., the interrelationship of patent law, trade secret law, and antitrust law.

B.

Likewise, petitioner's reliance (Pet. pp. 8, 9) on *U.S. v. Hohri*, 107 S.Ct. 2246 (1987) is misplaced. There is no conflict between the decision below and *Hohri*, which dealt with the placement of many Japanese-Americans in internment camps during World War II. The question whether the Federal Circuit or the District of Columbia Circuit had jurisdiction over the appeal in *Hohri* hinged on a detailed analysis of the "ambiguity inherent" in the wording of §1295(a)(2) (p. 2251). This analysis is of no relevance to the present petition directed to the completely different and separate provisions of 28 U.S.C. §1295(a)(1).

3.

A.

The decision below does not conflict with other decisions of Courts of Appeal as suggested by petitioner (Pet. pp. 5, 6, 8). *Kidde, Inc. v. E.F. Bavis & Assoc.*, 735 F.2d 1085 (8th Cir. 1984) and *Atari, Inc. v. JS&A*, 747 F.2d 1422 (Fed. Cir. 1984) do indeed hold that the Federal Circuit has exclusive jurisdiction under 28 U.S.C. §1295(a)(1) of an appeal from a decision of a district court if the jurisdiction of the district court arose under the patent laws. The jurisdiction of the District Court at the time of its June 1986 ruling however did not arise under the patent laws—all patent issues had been finally adjudicated prior to October 1982.

While the case contained substantial patent issues for a long time, there are none now present. The non-bumper damages issue was determined by the Special Master, the District Court (which issued a "Final Judgment" on October 6, 1980), and the Third Circuit (which in 1981 affirmed the "Final Judgment" of the District Court). Petitions for certiorari on the point have been repeatedly denied. It is hard to imagine anything more final—or less deserving of certiorari.

The Federal Circuit had no jurisdiction over the appeal in this case since patent law questions no longer continue to be present, notwithstanding the fact that the complaint when filed in 1956 properly alleged jurisdiction under 28 U.S.C. §1338. *USM Corporation v. SPS Technologies, Inc.*, 770 F.2d 1035 (Fed. Cir. 1985); *Atari*, 747 F.2d 1422.

As the Federal Circuit held in *Atari*, 747 F.2d 1429:

> Achievement of increased uniformity in the substantive law of patents does not require that this court get its hands on every appeal involving an allegation that a patent law issue is somehow involved. . . . [A] mere allegation that patent law is involved will not give this court jurisdiction when that of the district court did not rest at least in part on *a continuing* claim arising under the patent . . . laws (emphasis added).

In other places in *Atari*, *Id.*, the Court referred to the need for a "continuing non-frivolous patent claim under §1338" in the district court, for the Federal Circuit to have jurisdiction over an appeal (*Id.*, pp. 1433, 1437). The non-bumper parts damages issue which was in this case years ago has not by any realistic standard remained a continuing, non-frivolous patent claim under §1338. The only issue properly before the District Court in June of 1986 was the non-patent question of whether petitioner was entitled to additional postjudgment interest on money previously paid into Court.

Thus, there is no conflict between the decision below and cases holding that the Federal Circuit has exclusive jurisdiction over rulings of district courts in cases arising under the patent laws.

B.

There is also no conflict between the decision below and cases cited by petitioner (Pet. p. 9) for the proposition that jurisdictional statutes such as 28 U.S.C. §1295 "cannot be ignored for reasons of either fair-

ness or efficiency" *Professional Managers' Association v. United States*, 761 F.2d 740, 745 (D.C. Cir. 1985); *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

The jurisdictional statute was not ignored by the Federal Circuit or the Third Circuit. What the Federal Circuit did here in transferring the appeal to the Third Circuit pursuant to 28 U.S.C. §1631 was to follow its ruling in *USM Corp.*, 770 F.2d 1035, which was cited in the Order transferring this case to the Third Circuit (3a).

In *USM Corp., Id*, the Federal Circuit phrased the issue quite properly to be whether it had jurisdiction (770 F.2d at 1036, 1037):

> This appeal *raises the question of our jurisdiction* over an appeal where the Seventh Circuit has finally adjudicated all patent issues and only non-patent issues remain, in a case where the jurisdiction of the district court was originally based, in part, upon 28 U.S.C. §1338(a). (emphasis added).
>
> * * *
>
> Policies of judicial efficiency favor transferring the appeal to the Seventh Circuit. This case has already been before the Seventh Circuit twice on appeal with many of the underlying issues fully briefed by the parties to that Court.

It is clear that questions of jurisdiction, fairness and efficiency are not always neatly compartmentalized and the fact that fairness and efficiency are mentioned does not mean that jurisdiction was ignored.

It is also clear that the *USM Corp.* case and this case are remnants of a probably now extinct species— an appeal prior to 1982 to a regional court of appeals and a subsequent appeal raising a question of the Federal Circuit's jurisdiction.

Another example of this type of perfectly proper analysis is found in *Atari*, 747 F.2d 1428, 1429:

> The present motion enables the court, with the appreciated cooperation of ten *amici*, to respond in part to Congress' expectation that it would formulate appropriate standards for determining jurisdiction.
>
> * * *
>
> That this court upholds its jurisdiction here does not preclude a contrary holding in future, different cases. Nor does it preclude transfer under 28 U.S.C. §1631 of an appeal so devoid of patent issues, present or potential, as to suggest transfer. Federal courts have declined jurisdiction over pendent and ancillary claims in the interest of "judicial economy, convenience, and fairness to litigants." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966).

28 U.S.C. §1631 allows a transfer from one Court of Appeals to another where there is a "want of jurisdiction. . .if it is in the interest of justice. . ." All issues arising under the patent laws having been decided prior to the creation of the Federal Circuit, there was no jurisdiction in the Federal Circuit over the latest appeal and §1631 directs the courts to consider the interest of justice along with the jurisdic-

tional issue. The Third Circuit on three prior occasions had considered the ancient and enormous record in this case and it was in the interest of justice not to require the Federal Circuit to duplicate this effort.

CONCLUSION

1. The decision below (a) deals with petitioner's attempt to be awarded additional money and involves no issues of public importance; (b) is not in conflict with decisions of other Courts of Appeal; (c) is totally unrelated to the issues in *Christianson v. Colt*, *supra*; and (d) was decided correctly.

2. A decision in a case filed over thirty years ago, where there were numerous appeals filed prior to the October 1982 establishment of the Federal Circuit and where all issues arising under the patent laws were finally adjudicated prior to October 1982 will provide no clarification or guidance for future cases.

3. The petition for a writ of certiorari should be denied.

Respectfully submitted,

ARTHUR G. CONNOLLY, JR.
CONNOLLY, BOVE, LODGE & HUTZ
1220 Market Building
Post Office Box 2207
Wilmington, Delaware 19899
(302) 658-9141
Attorneys for General Motors Corp.

Of Counsel:

Arthur G. Connolly, Esquire
Connolly, Bove, Lodge & Hutz
1220 Market Building
Post Office Box 2207
Wilmington, Delaware 19899
(302) 658-9141

William A. Schuetz, Esquire
General Motors Patent Section
3031 W. Grand Boulevard
Detroit, Michigan 48232
(313) 974-1306

George E. Frost, Esquire
Barnes, Kisselle, Raisch,
Choate, Whittemore & Hulbert, PC
401 S. Woodward Avenue
Birmingham, Michigan 48011
(313) 540-9767

APPENDIX

APPENDIX A

Pursuant to Supreme Court Rule 28.1 the following information is provided by General Motors Corporation.

General Motors Corporation is not a subsidiary of a publicly owned corporation. All subsidiaries and affiliates of General Motors Corporation are wholly-owned except:

Alambrados Automatrices, S.A. C.V. (Mexico)

Alambrados y Circuitos Electricos, S.A. de C.V. (Mexico)

AMBRAKE Corporation (USA)

Aralmex, S.A. de C.V. (Mexico)

Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)

Cableados de Juarez, S.A. de C.V. (Mexico)

CABLESA-Industria de Componentes Electricos Limitada (Portugal)

Calsonic Harrison Co., Ltd. (Japan)

Compania Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico)

Componentes Delfa, C.A. (Venezuela)

Componentes Mecanicos de Matamoros, S.A. de C.V. (Mexico)

Conductores y Componentes Electricos, de Juarez, S.A. de C.V. (Mexico)

Convesco Vehicle Sales GmbH (West Germany)

Daewoo Automotive Components, Ltd. (Korea)

Daewoo Motor Co., Ltd. (Korea)

Delco Electronics Corporation (USA)

Delkor Battery Company, Ltd. (Korea)

Delmex de Juarez, S.A. de C.V. (Mexico)

Delredo, S.A. de C.V. (Mexico)

Detroit Deere Corporation (USA)

DHB - Componentes Automotivos S.A. (Brazil)

DHMS Industries, Ltd. (Korea)

DR DE CHIHUAHUA, S.A. de C.V. (Mexico)

Fabrica Columbiana de Automotores S.A. ("Colomotores") (Columbia)

General Motors de Colombia S.A. (Colombia)

General Motors del Ecuador S.A. (Ecuador)

General Motors Egypt, S.A.E. (Egypt)

General Motors Espana, S.A. (Spain)

General Motors (Europe) AG (Switzerland)

General Motors France (France)

General Motors Hellas, A.B.E.E. (Greece)

General Motors Iran Limited (Iran)

General Motors Kenya Limited (Kenya)

General Motors Korea Co., Ltd. (Korea)

General Motors del Peru S.A. (Peru)

General Motors de Portugal, Limitada (Portugal)

General Motors Terex do Brasil Ltda. (Brazil)

GM Allison Japan Limited (Japan)

GM Locomotivas Ltda. (Brazil)

GMFanuc Robotics Coporation (USA)

Hua Tung Automotive Corporation (Rep. of China)

Ilmor Engineering, Ltd. (England)

Industries Mecaniques Maghrebines, S.A. (Tunisia)

Industrija Delova Automobila, Kikinda (Yugoslavia)

INLAN-Industria de Componentes Mecanicos, Lda. (Portugal)

Isuzu Motors Limited (Japan)

Isuzu Motors Overseas Distribution Corp. (Japan)

Kabelwerke Reinshagen GmbH (West Germany)

Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)

Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)

Koram Plastics Company, Ltd. (Korea)

Metal Casting Technology, Inc. (USA)

Motor Enterprises, Inc. (USA)

New United Motor Manufacturing, Inc. (USA)

NHK Inland Corporation (Japan)

Omnibus BB Transportes, S.A. (Ecuador)

Promotora de Partes Electronicos Automotrices (Mexico)

P.T. Mesin Isuzu Indonesia (Indonesia)

Rimir, S.A. de C.V. (Mexico)

Rio Bravo Electricos, S.A. de C.V. (Mexico)

Senalizacion y Accesorios del Automovil Yorka, S.A. (Spain)

Shinsung Packard Company, Ltd. (S. Korea)

Sistemas Electricos y Conmutadores, S.A. de C.V. (Mexico)

Sung San Company, Ltd. (S. Korea)

Suzuki Motor Co., Ltd. (Japan)

TEREX Equipment Limited (Scotland)

Vauxhall Motors Limited (England)

Vestiduras Fronterizas, S.A. de C.V. (Mexico)

Volvo GM Heavy Truck Corporation (USA)

Some of the processes accused as infringements were performed by General Motors using materials purchased under indemnity agreements with one or more of the following:

1. Anchem Products, Inc. (Union Carbide)
2. Bethlehem Steel Corporation
3. Braun Engineering Company (Masco Corp.)
4. Colt Industries, Inc.
5. LTV Corporation
6. Occidental Petroleum Corp.
7. Pennwalt Corporation
8. Republic Steel Corp.
9. United States Steel Corp.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF OF PETITIONER

SIDNEY BENDER
AARON LEWITTES
JANINE L. BENDER
LEVENTRITT LEWITTES & BENDER
1205 Franklin Avenue
Garden City, N.Y. 11530
(516) 742-4250

ALFRED W. PUTNAM, JR.
DRINKER, BIDDLE & REATH
1100 Philadelphia National Bank Building
Philadelphia, Pa. 19107
(215) 988-2700

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

ROBERT K. PAYSON
POTTER, ANDERSON & CORROON
350 Delaware Trust Building
Wilmington, Del. 19899
(302) 658-6771

Counsel for Petitioner

* Counsel of Record

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---

REPLY BRIEF OF PETITIONER

In the petition for certiorari, we demonstrated that the exercise of jurisdiction by the Third Circuit and the rejection of jurisdiction by the Federal Circuit in this case raises an important issue of federal law concerning appellate jurisdiction in patent cases, which has not been decided by this Court and which has been the subject of conflicting interpretations among the courts of appeals. In effect, respondent asserts that this Court should ignore the important jurisdictional issue in this case because the litigation has been complicated and protracted. That is, however, a wholly inadequate reason to permit the provision of the Federal Courts Improvement Act governing

patent appeals, 28 U.S.C. § 1295(a), to remain in a state of flux. For the reasons that follow, the Court should grant the petition.

1. In its Opposition, respondent fails to dispute the simple and controlling fact that the jurisdiction of the district court below "indisputably arose under the patent laws." Pet. 3, 5; Opp. 8. In 28 U.S.C. § 1295(a), Congress provided with unmistakable clarity that "the Federal Circuit shall have exclusive jurisdiction of an appeal from a final decision of a district court . . . if the jurisdiction of that court was based, in whole or in part, on [the patent law,] section 1338." The decision of the Federal Circuit to reject jurisdiction over this appeal—and the subsequent decision of the Third Circuit to accept jurisdiction—is thus flatly contrary to Congress' intent that the Federal Circuit's jurisdiction is established if the district court's jurisdiction arose, in whole or in part, under the patent laws. Pet. 6-8. This Court's adoption, under the plain meaning of Section 1295, of that straightforward standard for determining the Federal Circuit's exclusive jurisdiction will eliminate the waste of appellate resources that has resulted from the Federal Circuit's creation of a flexible jurisdictional standard based on "comity and judicial economy."

What is more, the erroneous holdings of the Federal and Third Circuits below plainly conflict with the decisions of those courts of appeals that have held that the statute means what it says. See *Kidde, Inc.* v. *E.F. Bavis & Assoc.*, 735 F.2d 1085 (8th Cir. 1984); Pet. 8-11. *USM Corporation* v. *SPS Technologies, Inc.*, 770 F.2d 1035 (Fed. Cir. 1985), relied upon by respondent (Opp. 10-11), merely reinforces petitioner's contention that the Federal Circuit continually disregards Congress' jurisdictional commands. In *USM Corp.*, as in the present case, the Federal Circuit transferred an appeal to one of the regional circuits, not because of a lack of juris-

diction, as required by statute,[1] but rather because of a finding of "judicial efficiency." Opp. 10; see App. 3a (transfer in "interests of comity and judicial economy"). Thus, respondent's reliance on *USM Corp.* provides no support for its contention that the jurisdictional rulings below were unexceptional. To the contrary, *USM Corp.* enhances petitioner's argument that there is a clear conflict between the rulings below and the holdings of this Court and other courts of appeals that jurisdictional statutes cannot be overridden on grounds of "judicial efficiency and fairness." *Professional Managers' Ass'n* v. *United States*, 761 F.2d 740, 744-745 (D.C. Cir. 1985); see *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978).

Respondent argues, contrary to the plain meaning of Section 1295(a), that the statute should be interpreted to establish jurisdiction in the Federal Circuit only in appeals raising "substantial patent issues"—rather than in all *cases* in which jurisdiction in the district court is based on the patent law. Opp. 8-9. As petitioner has demonstrated (Pet. 6-7), that reading of the statute plainly is wrong. But, more important, that argument completely undermines respondent's assertion that the impact of the decision below is limited to this case. The fact, repeatedly cited by respondent, that this case was initiated prior to the Federal Courts Improvement Act is simply irrelevant to the respondent's theory of jurisdiction under Section 1295. The Third Circuit's exercise of jurisdiction, and the Federal Circuit's rejection of jurisdiction, in this case can be justified *only* by respondent's strikingly incorrect reading of the statute. That interpretation raises the fundamental, and recurring, question of whether Con-

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[1] Such a transfer is, of course, flatly contrary to the mandate of 28 U.S.C. 1631, which requires (1) an express finding of lack of jurisdiction in the transferor court and (2) a finding of jurisdiction in the transferee court. 28 U.S.C. 1631; Pet. 2; see *Hempstead Cty. & Nevada Cty. Project* v. *E.P.A.*, 700 F.2d 459, 462 (8th Cir. 1983).

gress' grant of exclusive appellate jurisdiction may be overridden, on a case-by-case basis, by an appellate court's post-hoc characterization of the "issues" presented or by the court of appeals' assessment of "comity and judicial economy." See Pet. 4, 6.

2. Respondent also claims that the petition should be disregarded as petitioner's effort to "shop" for a more accommodating forum. In fact, petitioner's motion in the district court seeking reasonable royalties on a finding of infringement (from which this appeal arises) was based on Federal Circuit case law which called into question the validity of the prior Third Circuit decision in this case.[2] See App., 11a-12a. Petitioner properly filed its appeal in the Federal Circuit. Pet. 4. It was respondent that engaged in forum shopping and sought (successfully) to avoid the force of the intervening decisions of the Federal Circuit by having the case transferred to the Third Circuit. Thus, at bottom, respondent's actions fly in the face of Congress' intent to lay to rest such "forum shopping" practices when it enacted the Federal Courts Improvement Act. See S. Rep. No. 275, 97th Cong., 2d Sess. 5-6; Pet. 7-8.

3. Respondent's and the Third Circuit's interpretation of the statutory language at issue clearly illustrates the

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[2] Although, for reasons stated above, the nature of the issues raised in the district court is completely irrelevant to the jurisdictional question, it is clear that petitioner did in fact raise substantial "patent issues" in the appeal below. One of the major issues presented in that appeal was stated as follows:

> Does the decision of this Court awarding no royalty whatsoever for the infringement of 1.3 billion non-bumper parts under 35 U.S.C. sec. 284, which mandates an award "in no event less than a reasonable royalty" whenever infringement is found, conflict with supervening law of the Federal Circuit explicitly holding that an award of no royalty is contrary to the express statutory provision and explicitly mandating an award of a reasonable royalty in every case where infringement is proven?

Brief of Technograph Liquidating Trust, p. 3 (March 16, 1987).

complementary nature of the issue presented in the instant case and that raised in *Christianson* v. *Colt Industries Operating Corporation*, petition for cert. pending, No. 87-499 (filed Sept. 23, 1987). Under respondent's interpretation of the jurisdictional statute, the appeal in *Christianson*—in which the complaint "seeks no direct relief under the patent laws but . . . deal[s] with substantial patent issues"—presumably would be heard by the Federal Circuit. Opp. 7-8. By contrast, under the standard proposed by petitioner, the appeal in *Christianson* would be heard in one of the regional courts of appeals—assuming, as respondent states, that the jurisdiction in the *Christianson* case was not based on the patent laws.

The only real difference between the Federal Circuit's decision in *Christianson* and the Third Circuit's decision below is that, in *Christianson*, the Federal Circuit admitted that it did not have jurisdiction and then proceeded to decide the merits while the Third Circuit below remained mute regarding its obvious lack of jurisdiction to hear the appeal. The two cases thus involve closely related questions of the interpretation of Section 1295 (a), in which both courts ultimately were without jurisdiction and yet both reached the merits of the cases before them.

Accordingly, respondent's contention that *Christianson* involves "totally unrelated issues" is flatly incorrect. The broad jurisdictional holding defended by respondent in its Opposition has a clear nexus to the jurisdictional issue raised in the *Christianson* petition. Thus, although *Christianson* and the present case do not present identical issues—because the instant petition involves a case in which the district court's jurisdiction unquestionably was based on Section 1338—both petitions raise complementary issues concerning the proper interpretation of the Federal Circuit's jurisdiction over patent appeals under Section 1295 (a). The two cases, in tandem, present the Court with an

opportunity to resolve virtually all of the issues concerning Section 1295(a) which have given rise to conflicts in the courts of appeals. See *Christianson*, 798 F.2d 1051, 1058 n.10 (7th Cir. 1986) (noting "burgeoning list of cases delineating, at considerable expense to the parties and the judicial system . . . the boundaries of 28 U.S.C. § 1295(a)(1)"). Accordingly, the Court should grant both petitions and hear the cases together.

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY BENDER
AARON LEWITTES
JANINE L. BENDER
LEVENTRITT LEWITTES & BENDER
1205 Franklin Avenue
Garden City, N.Y. 11530
(516) 742-4250

ALFRED W. PUTNAM, JR.
DRINKER, BIDDLE & REATH
1100 Philadelphia National Bank Building
Philadelphia, Pa. 19107
(215) 988-2700

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

ROBERT K. PAYSON
POTTER, ANDERSON & CORROON
350 Delaware Trust Building
Wilmington, Del. 19899
(302) 658-6771

Counsel for Petitioner

* Counsel of Record

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TECHNOGRAPH LIQUIDATING TRUST,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER TECHNOGRAPH LIQUIDATING TRUST

SIDNEY BENDER
AARON LEWITTES
JANINE L. BENDER
SYMA S. LEVINE
LEVENTRITT LEWITTES & BENDER
1205 Franklin Avenue
Garden City, N.Y. 11530
(516) 742-4250

ALFRED W. PUTNAM, JR.
DRINKER BIDDLE & REATH
1100 Philadelphia National Bank Building
Philadelphia, Pa. 19107
(215) 988-2700

REX E. LEE*
CARTER G. PHILLIPS
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

ROBERT K. PAYSON
POTTER ANDERSON & CORROON
350 Delaware Trust Building
Wilmington, Del. 19899
(302) 658-6771

Counsel for Petitioner

* Counsel of Record

June 22, 1988

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER TECHNOGRAPH LIQUIDATING TRUST

In light of this Court's decision in *Christianson v. Colt Industries Operating Corp.*, No. 87-499, June 17, 1988, petitioner Technograph Liquidating Trust respectfully submits this supplemental brief in support of its petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit. Under *Christianson*, this Court should grant the petition, vacate the judgment of the Court of Appeals for the Third Circuit in *Technograph Liquidating Trust v. General Motors Corp.* for want of jurisdiction, and remand with instructions to transfer the case to the United States Court of Appeals for the Federal Circuit for review on the merits.

Christianson confirms that petitioner was correct in its interpretation of the grant of jurisdiction in 28 U.S.C. Sec. 1295 (a)(1). First, the Federal Circuit erred when it abdicated its jurisdiction of the appeal where the *district court's* jurisdiction was indisputably based on section 1338* and where 28 U.S.C. Sec. 1295(a)(1) explicitly mandates that such an appeal lies in the Federal Circuit. *Christianson*, sl. op. 11. Second, the Third Circuit erred in accepting and deciding the appeal where the Federal Circuit's decision to transfer the case to it "was clearly wrong," *Christianson*, sl. op. 15. *Christianson* reaffirms that "[c]ourts created by statute can have no jurisdiction but such as the statute confers." *Id.*

As is relevant to this case, *Christianson* stands for the following propositions:

1. The mandatory reference point for appellate jurisdiction under Section 1295(a)(1) is the predicate for jurisdiction of the district court. "Since the District Court's

* Complaint, para. 1 (20a).

jurisdiction is determined by reference to the well-pleaded complaint, not the well-tried case, the referent for the Federal Circuit's jurisdiction must be the same." *Christianson*, sl. op. at 11. Thus, in the petition *sub judice*, given that the jurisdiction of the district court indisputably arises under section 1338, the Federal Circuit is the *only* court that has jurisdiction of the appeal in this case. Neither "interests of comity and judicial economy" (Technograph Transfer Order, 3a) nor interests of justice can create a jurisdictional basis where none exists.

2. A clearly erroneous decision with regard to jurisdiction cannot in any event bind another court. *Christianson* reminds us that if a transfer order is "clearly wrong," the transferee court is *obliged* to decline jurisdiction, sl. op. 15. Here, the transfer order of the Federal Circuit was "clearly wrong": it ignored the statutory mandate of 28 U.S.C. § 1295(a)(1); it ignored the requirement of 28 U.S.C. § 1631 — it did not, because it could not, make a finding of a "want of jurisdiction"; and it focused on irrelevant factors such as "comity and judicial economy." (3a). Jurisdiction over Technograph's appeal did not raise a close question nor was the Federal Circuit's transfer decision "plausible," sl. op. 17. Thus, the Third Circuit erred in deciding the case despite its lack of jurisdiction. Because the doctrine of "law of the case will not shield an incorrect jurisdictional decision. . . . " *Christianson*, sl. op. at 17, this Court should now rectify that error by vacating the judgment below.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the Court of Appeals for the Third Circuit vacated, and the case remanded to the Third Circuit with instructions to transfer this case to the Court of Appeals for the Federal Circuit.

Respectfully submitted,

SIDNEY BENDER
AARON LEWITTES
JANINE L. BENDER
SYMA S. LEVINE
LEVENTRITT LEWITTES & BENDER
1205 Franklin Avenue
Garden City, N.Y. 11530
(516) 742-4250

ALFRED W. PUTNAM, JR.
DRINKER BIDDLE & REATH
1100 Philadelphia National Bank Building
Philadelphia, Pa. 19107
(215) 988-2700

REX E. LEE*
CARTER G. PHILLIPS
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

ROBERT K. PAYSON
POTTER ANDERSON & CORROON
350 Delaware Trust Building
Wilmington, Del. 19899
(302) 658-6771

Counsel for Petitioner

June 22, 1988

* Counsel of Record